Supreme Court, U.S.
FILED
JUN 7 1996
OFFICE OF THE CLERK

No. 95 1981

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MARY ANNA GNADT,

Petitioner,

v.

ERNEST G. CASTRO, *et al.*,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. CLIFFORD*
MONA LYONS
McLeod, Watkinson & Miller
One Mass. Ave., N.W.
Suite 800
Washington, DC 20001
(202) 842-2345
* *Counsel of Record*

Of Counsel:
STEPHEN B. MERCER
8605 Cameron Street
Suite M-8
Silver Spring, MD 20910
(301) 585-2144

June 7, 1996

QUESTION PRESENTED

Whether Section 704(a) of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against any of his employees for engaging in protected activity under Title VII, permits an employer to retaliate against a former employee who has filed an E.E.O.C. charge?[1]

---

[1] The question presented here is identical to that presented in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376).

PARTIES TO THE PROCEEDING

1. Mary Anna Gnadt (hereafter referred to as "Gnadt"), plaintiff in the district court and petitioner.

2. Ernest G. Castro; Castro Family Incorporated, t/a Mama's Italian Restaurant and Tino's Sports Lounge (hereafter referred to as "Castro"), defendants in the district court and respondents.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

1. The Nature of the Case 3

2. Proceedings Before the District Court and a Panel of the Fourth Circuit 4

REASONS WHY REVIEW SHOULD BE GRANTED . 5

1. Review Should Be Granted Because an Important Identical Issue Is Already Pending Before the Court in *Robinson v. Shell Oil Co.*. 5

2. Alternatively, Consideration of this Petition Should Be Deferred Until a Decision is Reached in *Robinson v. Shell Oil Co.* 7

CONCLUSION 8

APPENDIX

Gnadt v. Castro, et al., No. 95-1369 (4th Cir. March 12, 1996) (unpublished opinion below) A.1

TABLE OF AUTHORITIES

Statutory Provision

42 U.S.C. § 2000e-3(a), Title VII § 704(a) of the Civil Rights Act of 1964 2

Judicial Decisions

Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) 6

Charlton v. Paramus Bd. of Educ., 25 F.3d 194 (3rd Cir. 1994) 6

Dunlop v. Carriage Carpet Shop, 548 F.2d 139 (6th Cir. 1977) 6

E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 6

Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303 (5th Cir. 1972) 6

O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982) 6

Pantchenko v. C.B. Dolge Co., Inc., 581 F.2d 1052 (2nd Cir. 1978) 6

Passer v. American Chemical Soc., 935 F.2d 322 (D.C. Cir. 1991) 6

Reed v. Shepard, 939 F.2d 484, 492 (7th Cir. 1991) 7

Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376) 1, 5

Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977) 6

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM. 1995

MARY ANNA GNADT,
Petitioner,

v.

ERNEST G. CASTRO, *et al.*,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Mary Anna Gnadt petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the judgment which that court entered against her in its Case No. 95-1369. Alternatively, the petitioner respectfully requests the Court to defer consideration of this petition until the Court decides the case of *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376).

OPINION BELOW

The opinion of the court of appeals in *Gnadt v. Castro, et al.*, No. 95-1369 (4th Cir. March 12, 1996) is unpublished and is reproduced in the appendix to this petition at A.1.

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on March 12, 1996 (A.1). The present petition was filed with this Court on June 7, 1996. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(b). The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(f)(3), and under 28 U.S.C. § 1331. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

1. *The Nature of the Case.* In December 1993, soon after he learned that she had filed an E.E.O.C. charge, Gnadt's former employer, Ernest Castro, threatened to "fry" her if she pursued a sex discrimination claim against his restaurant, Mama's Italian Restaurant and Tino's Sports Lounge (Tino's). (Jt. App., Vol. II., pp. 58-60).[2] Gnadt had been employed by Castro during law school as a part-time bartender until her resignation was provoked by a demotion from bartender to cocktail waitress because, as her supervisor explained, it was too tacky to have a man as a cocktail waitress and a woman behind the bar. (Jt. App., Vol. II., p. 49). Three weeks later Gnadt filed an E.E.O.C. charge of sex discrimination.

Two weeks after that Castro, now her former employer, made a late night phone call to Gnadt demanding that she talk to him about the charge. (Jt. App., Vol. II., p. 56). Gnadt declined to speak with Castro that night and after that date, Castro left several messages for her on her telephone answering machine. Gnadt began to feel intimidated by the frequency and tone of Castro's phone calls and messages, and requested her attorney to write a letter asking Castro to leave her alone. (Jt. App., Vol. II., p. 57). One week later, Castro made his final phone call to Gnadt and left the following message on her answering machine:

> Anna, Ernie Castro. I will be at the restaurant until 1:00 tonight. 385-2646. I am

---

[2] Citation to the joint appendix is for the convenience of the Court should it request transmittal of the document from the clerk of the court of appeals.

> in receipt of another letter from an attorney. I might want to tell you right now that I have three sworn affidavits from the first three employees of mine that I asked that are totally negative against you and your case, and from the ones I talked to, I could have 20 of those if I needed them. If you want me to pursue this and you want to pursue it, all I can tell you is I can fry you. Now, out of respect for your boyfriend, Tony, I don't want to do that. However, if you want to continue to pursue this, I can make life very miserable for you in this Northern Virginia area, especially in the legal field. I know a lot of lawyers and after I get through talking with them, your prospects for employment with any of them will be very, very, very slim. Now, if you have [sic] like to reconsider your position and call me back tonight, I will be here. If you want to pursue this, prepare to be fried.

(Jt. App., Vol. II., pp. 59-60).

A few days later, Castro repeated to Gnadt's attorney his threat to give negative references about her to prospective employers, and told Gnadt's attorney that he would advise them that Gnadt was a disloyal, unreliable and poor employee. (Jt. App., Vol. II., pp. 61 & 204). Subsequently, Gnadt amended her discrimination charge to include Castro's retaliatory conduct.

2. *Proceedings Before the District Court and a Panel of the Fourth Circuit*. At the close of Gnadt's case-in-chief, the district court entered judgment as a matter of law on the retaliation claim in favor of Castro, as well as on the

counts of sex discrimination and constructive discharge. On the retaliation claim, the district court ruled that, assuming Gnadt could state a claim of postemployment retaliation under sec. 704(a) as a former employee, absent actual interference with her employment or professional opportunities by Castro, his threat to retaliate did not rise to an actionable level. (Jt. App., Vol. II., pp. 212-13). On appeal, a three-judge panel of the fourth circuit reversed the district court's ruling that Castro had rebutted the presumption of sex discrimination arising from Gnadt's case-in-chief, and disposed of the retaliation claim as foreclosed by the court's recent *en banc* decision in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376). *Gnadt v. Castro*, No. 95-1369 (4th Cir. March 12, 1996) (Appendix at A.6.)

Gnadt timely filed this petition for certiorari.

REASONS WHY REVIEW SHOULD BE GRANTED

1. *Review Should Be Granted Because An Important Identical Issue Is Already Pending Before the Court in Robinson v. Shell Oil Co.* The Court has granted certiorari in *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376), to resolve an important question of statutory interpretation that has split the circuit courts of appeal. The present petition by Gnadt raises the same question as *Robinson*, *i.e.*, whether sec. 704(a) of Title VII protects employees from acts of post-employment retaliation by their former employers.

The majority of the circuit courts have construed sec. 704(a) to protect employees against acts of postemployment

retaliation by their past employers arising out of and related to their former employment. *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 197-200 (3rd Cir. 1994)(retaliation claim could be asserted where school district alleged to have revived state proceedings for revocation of teacher's teaching certificate in retaliation for her decision to continue pursuing a Title VII action challenging her termination as discriminatory); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509-10 (11th Cir. 1988)(plain meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying Title VII); *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir. 1987)(strict and narrow interpretation of the word "employee" to exclude former employees would undercut the remedial purposes of Title VII); *O'brien v. Sky Chefs, Inc.*, 670 F.2d 864, 869 (9th Cir. 1982)(retaliation claims could be asserted by terminated employees who employer refused to rehire and gave bad recommendations about after termination and the filing of EEOC charges); *Pantchenko v. C.B. Dolge Co., Inc.*, 581 F.2d 1052, 1054-55 (2nd Cir. 1978) (Title VII prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977)(retaliation provisions should be liberally construed because Title VII is a remedial statute); *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972)(under FLSA, former employees are protected from retaliation); *Passer v. American Chemical Soc.*, 935 F.2d 322, 330-31 (D.C. Cir. 1991)(interpreting identical provision under ADEA to include former employees as long as the alleged discrimination is related to or arises out of the employment relationship thus avoiding a result Congress could not have intended); *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139, 146 (6th Cir.

1977)(interpreting comparable provision of FLSA to protect a former employee). The minority view that sec. 704(a) does not include former employees is the rule only in the fourth and seventh circuits. *Robinson*, *supra*; *Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991).

Granting review in this case will assist the Court's resolution of this issue. More directly than *Robinson*, however, Gnadt's case presents evidence of her employer's malicious intent to punish and chill her exercise of an important civil right protected by a federal statute and, more clearly than *Robinson*, the facts of Gnadt's case illustrate the evil -- post-employment retaliation that actively hinders the enforcement of anti-discrimination laws -- that Congress intended to prevent by enacting sec. 704(a) of Title VII. Consideration of the issue presented in *Robinson* would, therefore, be more informed by granting Gnadt's petition and consolidating this case with *Robinson* for briefing and argument.

2. *Alternatively, Consideration of this Petition Should Be Deferred Until a Decision Is Reached in Robinson v. Shell Oil Co.* Gnadt has been actively pursuing her post-employment retaliation claim since January 5, 1994 and, but for the vagaries of timing in the litigation process, Gnadt's case might well have arrived in this Court before *Robinson*. If, however, the Court does not either grant Gnadt's petition and consolidate her case with *Robinson* or defer consideration of her petition pending the decision in *Robinson*, Gnadt will be deprived of the opportunity to pursue her claim further for no reason more substantial than the relative speed with which the two cases proceeded through the lower courts.

That, plainly, is not an equitable ground upon which to deprive Gnadt of a remedy. Consequently, if the Court

does not grant review in Gnadt's case before the decision in *Robinson*, the Court should, alternatively, defer consideration of this petition until its determination of the question raised in *Robinson*, which would control summary disposition of the identical issue presented here.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the court of appeals in this case. Alternatively, the Court should postpone consideration of this petition until a decision is rendered in *Robinson v. Shell Oil Co.*

Respectfully submitted,

JOHN M. CLIFFORD*
MONA LYONS
McLeod, Watkinson & Miller
One Mass. Ave., N.W.
Suite 800
Washington, DC 20001
(202) 842-2345

* *Counsel of Record*

Of Counsel:

STEPHEN B. MERCER
8605 Cameron Street
Suite M-8
Silver Spring, MD 20910
(301) 585-2144

APPENDIX

Gnadt v. Castro, No. 95-1369 (4th Cir. March 12, 1996)(unpublished opinion below)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARY ANNA GNADT,
Plaintiff-Appellant,

v.

ERNEST G. CASTRO; CASTRO FAMILY, INCORPORATED, t/a Tino's Sports Lounge, t/a Mama's Italian Restaurant, No. 95-1369
Defendants-Appellees

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-94-897-A)

Argued: January 31, 1996
Decided: March 12, 1996

Before RUSSELL and HAMILTON, Circuit Judges, and BLAKE, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Mona Lyons, MCLEOD, WATKINSON & MILLER, Washington, D.C., for Appellant, Gregory Beckwith, PHILLIPS, BECKWITH & HALL, Fairfax, Virginia, for Appellees. **ON BRIEF**: John M. Clifford, MCLEOD, WATKINSON & MILLER, Washington, D.C., for Appellant, John P. Rowe, Acting General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, John F. Suhre, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Mary Gnadt (Gnadt) appeals the district court's entry of judgment in favor of her employer in her suit alleging sex discrimination and post-employment retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 and Supp. 1995). For the following reasons, we affirm the district court's entry of judgment with respect to Gnadt's post-employment retaliation claim, but vacate the district court's entry of judgment with respect to Gnadt's sex discrimination claim and remand the case for further proceedings.

I.

Beginning in January 1992, while attending law school, Gnadt worked part-time as a waitress and later as a bartender at Mama's Italian Restaurant and Tino's Sports Lounge (Tino's) until her resignation from Tino's in October 1993. Upon her hiring, Gnadt was assigned both waitressing and bartending duties. Beginning in September 1993, Gnadt was assigned only bartending duties. Specifically, Gnadt was assigned as the sole bartender during the day shift on Sundays and the night shift on Mondays. Bernardo Terazas (Bernardo) was Gnadt's supervisor on the Sunday day shift and J.P. Forry was Gnadt's supervisor on the Monday night shift.

As a result of understaffing caused by two employees resigning, Tino's hired two additional bartenders in October 1993--a male (Michael Devine) and a female (Susan Gonzales). On October 15, 1993, Bernardo informed Gnadt that she had been reassigned. The reassignment meant that Gnadt would no longer bartend during the day shift on Sundays or the night shift on Mondays, but would waitress during both the day shift on Sundays and the night shift on Fridays. Michael Devine replaced Gnadt as the bartender during the day shift on Sundays and the night shift on Mondays. Gnadt questioned Bernardo about the reason for her reassignment. According to Gnadt, Bernardo responded: "Well, we just decided to." (J.A. Vol. II 43). The reassignment would provide Gnadt with the same number of working hours but at a lesser hourly rate of pay. Bartenders made $4.50 per hour while the waitstaff only made $2.01 per hour. Gnadt's remuneration from tips would stay essentially the same because at Tino's the waitresses and bartenders pooled their tips at the end of each shift and split the

pooled amount equally.

Upset with her reassignment, which she viewed as a demotion, Gnadt made numerous unsuccessful attempts between October 15 and 17, 1993 to contact Ernest Castro, the owner and general manager of Tino's, to discuss her reassignment. Unable to reach Ernest Castro, Gnadt contacted Bernardo. Gnadt asked Bernardo why Michael Devine could not wait tables during the day shift on Sundays and the night shift on Mondays while she remained the bartender on those shifts. According to Gnadt, Bernardo responded: "[I]t would be too tacky to have a man cocktail waitress and a woman behind the bar." (Id. at 49). Gnadt then asked Bernardo whether he was kidding. Bernardo stated: "Well, I didn't mean it that way." (Id. at 50).

On the evening of October 17, 1993, Gnadt reached Ernest Castro by telephone. At Gnadt's request, Diane Fallon, Gnadt's roommate and part-time waitress at Tino's, listened in on the conversation. Gnadt asked Ernest Castro why she had been demoted and whether the demotion was permanent. Ernest Castro told Gnadt that he did not consider the reassignment a demotion and that the reassignment was final. At that point, Gnadt informed Ernest Castro that she resigned from working at Tino's. Gnadt never returned to work at Tino's.

Less than a month later, Gnadt filed a charge of employment discrimination with the Fairfax County Human Rights Commission alleging that the removal of her bartending duties was based on her sex. The claim was forwarded to the Equal Employment Opportunity Commission (EEOC). Two weeks later, Ernest Castro telephoned Gnadt late at night and angrily demanded to

know why she had filed a charge of employment discrimination against him. Gnadt refused to discuss the charge with him. Thereafter, Ernest Castro left several messages on Gnadt's answering machine requesting that she telephone him.

At Gnadt's request, Martin Mooradian, an attorney for whom Gnadt was working as a law clerk, sent a letter to Ernest Castro requesting that he stop pestering Gnadt. Shortly after receiving Mooradian's letter, Ernest Castro left a message on Gnadt's answering machine stating that he would make life miserable for her in the Northern Virginia area, especially in the legal field, if she continued to pursue her allegation of sex discrimination. Ernest Castro subsequently telephoned Mooradian and made similar threats for Mooradian to pass along to Gnadt.

In response to Ernest Castro's threats, Gnadt amended her EEOC charge to include allegations of post-employment retaliation. After the EEOC issued a right-to-sue letter, Gnadt filed the present action against Tino's, i.e., Castro Family, Inc., and Ernest Castro (collectively, Tino's). Gnadt's complaint alleged that she was demoted because of her sex, see 42 U.S.C.A. § 2000e-2(a), and that she suffered post-employment retaliation for engaging in protected activities, see 42 U.S.C.A. § 2000e-3(a), both in violation of Title VII. Gnadt's complaint also alleged state law claims of constructive discharge and intentional infliction of emotional distress.

The district court conducted a bench trial on January 18, 1995. At the close of Gnadt's presentation of the evidence, Tino's moved for judgment as a matter of law under Federal Rule of Civil Procedure 52(c) on all claims. The district court granted the motion in toto. Specifically,

with respect to Gnadt's claim that she was demoted because of her sex, the district court found that Gnadt had met her burden of establishing a prima facie case, but that Tino's had articulated a legitimate, nondiscriminatory reason for the demotion that Gnadt failed to rebut. Gnadt filed a timely notice of appeal. On appeal, Gnadt only challenges the district court's entry of judgment with respect to her claim alleging that she was demoted because of her sex.* She asks that we vacate the district court's judgment with respect to that claim and remand the case for a new trial.

II.

To prevail on her claim of discriminatory demotion based on sex in violation of Title VII, Gnadt must prove by a preponderance of the evidence that Tino's demoted her "because of" her sex. 42 U.S.C.A. § 2000e-2(a)(1). Below, Gnadt proceeded under the familiar three-step proof scheme developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under that scheme, once the plaintiff establishes a prima facie case, a presumption of discrimination arises and the burden of production shifts to the employer, here Tino's, to articulate a legitimate, nondiscriminatory reason for the challenged employment decision. See St. Mary's Honor Center v. Hicks, 113

---

* Originally, Gnadt also appealed the district court's entry of judgment in favor of Tino's on her post-employment retaliation claim. However, at oral argument, Gnadt conceded that her post-employment retaliation claim is foreclosed by our recent en banc decision in Robinson v. Shell Oil Co., 70 F.2d 325, 330 (4th Cir. 1995) (en banc). Accordingly, we do not further address that claim.

S.Ct. 2742, 2747 (1993). If the employer carries this burden of production, the presumption of discrimination "drops out of the picture," see id. at 2749, and the plaintiff bears the ultimate burden of proving both that the employer's asserted reason was pretextual and that the plaintiff's sex was the true reason for the adverse employment action. See id. at 2752. To establish a prima facie case of discriminatory demotion under McDonnell Douglas, Gnadt bore the burden of proving the following elements by a preponderance of the evidence: (1) she was a member of a protected class; (2) she was demoted; (3) at the time of her demotion, she was performing her job at a level that met her employer's legitimate expectations; and (4) following her demotion, she was replaced by someone of comparable qualifications outside the protected class. See Tuck v. Henkel Corp., 973 F.2d 371, 375 (4th Cir. 1992), cert. denied, 113 S.Ct. 1276 (1993).

The district court disposed of Gnadt's claim of discriminatory demotion under Federal Rule of Civil Procedure 52(c), which provides in pertinent part:

> If, during a trial without a jury, a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Fed. R. Civ. P. 52(c). We review the district court's findings of fact in support of the granting of a Rule 52(c) motion under the clearly erroneous standard and its conclusions of law de novo. See Carter v. Ball, 33 F.3d

450, 457 (4th Cir. 1994).

In ruling on Tino's Rule 52(c) motion made at the close of Gnadt's case, the district court found that Gnadt had produced sufficient evidence to establish a prima facie case. Specifically, the district court found that Gnadt, a female, was a member of a protected class, see 42 U.S.C.A. § 2000e-2(a)(1), and based on the lower rate of pay for waitresses as compared to bartenders, the district court found that she had suffered a demotion. Then, based on her experience at Tino's, the district court found that Gnadt was a qualified bartender. Finally, the district court found that Gnadt was replaced by someone of comparable qualifications outside the protected class-that person being Michael Devine. Tino's does not argue that these findings are clearly erroneous.

Next, the district court concluded, based solely on the evidence presented in Gnadt's case-in-chief, that Tino's had articulated a legitimate, nondiscriminatory reason for demoting Gnadt. In reaching this conclusion, the district court relied on testimony by Gnadt and hearsay testimony by Diane Fallon, all elicited by Tino's during cross-examination, that Tino's needed to hire additional personnel. The district court also relied on the fact that an employer inherently has discretion to hire personnel to fulfill its personnel needs. Finally, the district court concluded that Gnadt failed to produce sufficient evidence to rebut this legitimate reason or that the true reason for her demotion was because she was female.

On appeal, Gnadt contends that she is entitled to a new trial on this claim because Tino's failed to meet its burden of production to articulate a legitimate, nondiscriminatory reason to rebut her prima facie case. See Hicks, 113 S.Ct.

at 2747. In response, Tino's argues that it met its burden of production by eliciting certain testimony during its cross-examination of Gnadt and Diane Fallon. In this regard, Tino's points to the following testimony: (1) Gnadt's testimony that two members of the waitstaff had left in the fall of 1993; (2) Gnadt's testimony that it was within management's discretion to hire new personnel; (3) Gnadt's testimony that some tension existed between her and J. P. Forry, her immediate supervisor on Monday nights; and (4) Diane Fallon's testimony that during the conversation she overheard between Gnadt and Ernest Castro, Castro stated that he reassigned Gnadt because he needed to staff his restaurant the best way that he could.

For an employer to meet its burden of production to articulate a legitimate, nondiscriminatory reason for its adverse action, the employer must "clearly set forth, through the introduction of admissible evidence, the reasons" for the adverse action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). Vague explanations are not sufficient. See id. at 258 (stating the employer's explanation of its legitimate reasons must be "clear and reasonably specific"). Furthermore, "the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." Id. at 255 n.9. Placing this burden of clearly articulating a legitimate reason on the employer serves a dual purpose. First, it enables the employer, by proffering a legitimate reason for the alleged discriminatory action, to rebut the inference of discrimination that arises from proof of the prima facie case. See id. at 258. In addition, the burden of production frames the factual issues with sufficient clarity to afford the plaintiff a full and fair opportunity to demonstrate pretext. Id.; see also Meiri v. Dacon, 759

F.2d 989, 997 (2d Cir. 1985) ("Were vague or conclusory averments of good faith sufficient to satisfy the employer's burden, Title VII employees seeking to demonstrate pretext would be unfairly handicapped."), cert. denied, 474 U.S. 829 (1985).

We agree with Gnadt that the district court erroneously concluded that Tino's met its burden of production to articulate a legitimate, nondiscriminatory reason for demoting her from bartender to waitress. The testimony cited by Tino's, which was relied upon by the district court, is, standing by itself, insufficient to clearly set forth a legitimate, nondiscriminatory reason for Tino's adverse personnel action. First, while the evidence of a need to hire additional personnel may have set the stage for Gnadt's demotion, it does not explain why Tino's decided to demote Gnadt from bartender to waitress. Next, mere acknowledgment by Gnadt that management has the discretion to hire new employees simply begs the question of whether Tino's demoted Gnadt because she was female. Diane Fallon's hearsay testimony that Castro stated that he needed to staff his restaurant the best way that he could similarly begs the same question. Finally, the fact that some tension existed between Gnadt and J. P. Forry does not, without more, explain Gnadt's demotion because the same problem did not exist between Gnadt and Bernardo, yet Michael Devine replaced Gnadt as the bartender during the Sunday day shift, which Bernardo supervised. All that one gleans from this evidence is that Tino's reason for the employment action remains unexplained. And, if the reason for the demotion was unexplained, it follows a fortiori that the district court was not at liberty to enter judgment under Rule 52(c).

We are not unmindful that a judgment in favor of Tino's at

the close of all the evidence may be warranted. It may well be that after the record is fully developed Gnadt cannot meet her ultimate burden of establishing that she was demoted on account of her sex. Indeed, in the Title VII context, we have affirmed the entry of judgment under Rule 52(c) at the close of the plaintiff's case-in-chief even though the plaintiff had established a prima facie case. See Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994). But the record in Ball was clear that the defendant had legitimate, nondiscriminatory reasons for the adverse action. See id. (plaintiff failed to meet deadlines and his performance as a network administrator was unsatisfactory). But, in this case, the record is not clear that comparable evidence exists. In short, the district court found-a finding that is not challenged on appeal-that Gnadt established a prima facie case of discriminatory demotion based on sex, which finding shifted the burden of production to Tino's to articulate a legitimate, nondiscriminatory reason for the demotion. At the time the district court entered judgment under Rule 52(c), no legitimate, nondiscriminatory reason had surfaced that would satisfy Tino's burden of production. Under these circumstances, rather than entering judgment in favor of Tino's, it was incumbent on the district court to put Tino's to the task of articulating a legitimate, nondiscriminatory reason for the demotion. Having failed to do so, the district court erroneously concluded that Tino's had articulated a legitimate, nondiscriminatory reason. Therefore, the presumption of discrimination created by Gnadt's prima facie case still awaits rebuttal. See Hicks, 113 S.Ct. at 2747. Accordingly, we vacate the judgment in part and remand this case to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED

Supreme Court, U.S.
FILED
JUL 31 1996
CLERK

No. 95-1981

In The

Supreme Court of the United States

October Term, 1995

MARY ANNA GNADT,

Petitioner,

vs.

ERNEST G. CASTRO and CASTRO FAMILY, INC. t/a MAMA'S ITALIAN RESTAURANT AND TINO'S SPORTS LOUNGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GREGORY BECKWITH
Counsel of Record
PHILLIPS, BECKWITH & HALL
Attorneys for Respondents
10513 Judicial Drive
Suite 100
Fairfax, Virginia 22030
(703) 691-4100

9146
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED FOR REVIEW

1. Whether § 704(a) of Title VII of the Civil Rights Act of 1964, which prohibits an employer from discriminating against any of his employees or applicants for employment for engaging in protected activity under Title VII, extends to a former employee for acts of retaliation allegedly occurring after the employment relationship has ended?

PARTIES TO THE PROCEEDING

1. Mary Anna Gnadt (hereinafter referred to as "Gnadt"), Plaintiff in the District Court and Petitioner.

2. Ernest G. Castro (hereinafter referred to as "Castro"); Castro Family, Inc., t/a Mama's Italian Restaurant and Tino's Sports Lounge (hereinafter referred to as "Tino's"), Defendants in the District Court and Respondents.

Pursuant to Rule 29 of the Rules of Supreme Court of the United States, Ernest G. Castro and Castro Family, Inc., the Respondents, make the following disclosure:

(i) Respondents are not publicly held corporations or other publicly held entities.

(ii) Respondents are not a parent subsidiary or affiliate of, or a traded association representing, a publicly held corporation or other publicly held entity.

(iii) No publicly held corporations or entities have a direct financial interest in the outcome of this litigation.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Statute Involved	2
Statement of the Case	2
A. Procedural History	2
B. Factual Summary	4
1. Employment History	4
2. Post Employment Activities	6
Summary of the Argument	7
Reasons for Denying the Writ	8
I. Protection against retaliation under Title VII does not extend to former employees.	8

Contents

Page

II. Anti-retaliation protection if applicable, exists when the retaliation results in discharge from a later job, refusal to hire, or other professional or occupational harm. 10

III. The District Court did not err in entering judgment for the Respondents on Petitioner's retaliation claim, having found that the Respondents did not interfere with any prospective business, educational, or other opportunities of the Petitioner. 12

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988) ... 10

Caminetti v. United States, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed 442 (1917) 9

Charlton v. Paramus Board of Education, 25 F.3d 194 (3rd Cir. 1994) 10

Dunlop v. Carriage Carpet Shop, 548 F.2d 139 (6th Cir. 1977) 11

E.E.O.C. v. Cosmair, Inc., 821 F.2d 1085 (5th Cir. 1987) 11

Contents

	Page
Evans v. Davey Truckers, Inc., 769 F.2d 1012 (4th Cir. 1985)	13
Fahie v. New York City Department of Corrections, 737 F. Supp. 15 (S.D.N.Y. 1990)	12
K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988)	8, 9
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)	12
O'Brien v. Sky Chefs, Inc., 670 F.2d 864 (9th Cir. 1982)	11
Pantchenko v. C.B. Dolge Company, Inc., 581 F.2d 1052 (2nd Cir. 1978)	11
Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991)	10
Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996)	7, 8, 9
Ross v. Communication Satellite Corp., 759 F.2d 355 (4th Cir. 1985)	12
Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977)	11
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)	12

Contents

Page

United States v. Murphy, 35 F.3d 143 (4th Cir. 1994) ... 8

Statutes Cited:

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e-3(a), Title VII § 704(a) of the Civil Rights Act of 1964 ..... i, 1, 2, 3, 7, 8, 10, 12, 15

42 U.S.C. § 2000e(f) 4, 8

Rules Cited:

Federal Rule of Civil Procedure 52(c) 3

Supreme Court Rule 10 14

APPENDIX

Appendix A — Excerpted Transcript of Proceedings ... 1a

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit.

Title VII § 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), declares it to be an unlawful employment practice for an employer to discriminate against "any of his employees or applicants for employment" because he has made a charge under Title VII. The issue in need of resolution is whether the term "employees" includes a former employee who voluntarily resigned against the will of her employer and later alleged acts of retaliation occurring after the employment relationship ended. If the answer is in the affirmative, the Court must then decide if a retaliation claim may survive absent a showing by the Petitioner that the retaliation interfered with any prospective business, educational, or other opportunities of the Petitioner. The trial court held there existed no evidence of actions by the Respondents which interfered with prospective business, educational or other activities of the Petitioner. This factual determination shall not be disturbed unless clearly erroneous.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, entered on March 12, 1996, is unpublished. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The Opinion of the United States District Court for the Eastern District of Virginia, entered on January 18, 1995, is found within the trial transcript (Jt. App., Vol. II., pp. 208-215). A copy of the trial court's opinion is reproduced in the Appendix attached. (App. A.1-A.9)

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the proper interpretation of a federal statute, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a):

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

A. Procedural History

The complaint in this case was filed in the United States District Court for the Eastern District of Virginia on the 8th day

of July, 1994, alleging counts of gender discrimination, constructive discharge, retaliation, and intentional infliction of emotional distress. The District Court, District Judge Leonie M. Brinkema presiding, conducted a bench trial on January 18, 1995. At the close of Gnadt's presentation of evidence, Respondents moved for judgment as a matter of law under Federal Rule of Civil Procedure 52(c) on all claims. The District Court granted the motion *in toto*. Gnadt filed a Notice of Appeal on February 13, 1995, appealing only the gender discrimination and retaliation counts. The appeal was docketed in the United States Court of Appeals for the Fourth Circuit on March 10, 1995.

On March 12, 1996, a panel of the United States Court of Appeals for the Fourth Circuit issued an unpublished opinion, which is reproduced in the appendix of the Petition for a Writ of Certiorari affirming the District Court's entry of judgment with respect to Gnadt's post employment retaliation claim and remanding the discrimination claim to allow Respondents to articulate a legitimate non-discriminatory reason for the lateral shift change of the Petitioner.

On May 10, 1996, further proceedings were held in the District Court. After Respondents' presentation of additional evidence, the Court again dismissed the Petitioner's gender discrimination claim, finding that the employer had a legitimate non-discriminatory reason for the lateral transfer of the Petitioner's job assignments.

Petitioner appeals only the retaliation claim having abandoned all other counts. In her Petition for the Writ of Certiorari, Gnadt argues that a majority of the Circuit Courts have construed § 704(a) to protect former employees against acts of post employment retaliation arising out of and relating to their former employment. The Petitioner requests that the term

"employees" be interpreted liberally to include former employees. The term "employee" is not ambiguous. Employee is defined as "an individual employed by an employer." 42 U.S.C.A. § 2000e(f). Because the language in Title VII's definition of "employee" is not ambiguous, any attempt to resort to legislative history is foreclosed.

B. Factual Summary

1. Employment History

In January, 1992 the Petitioner commenced her employment as a waitress with Castro Family, Inc., the corporate owner of Mama's Italian Restaurant and Tino's Sports Lounge. Prior to her employment with Castro Family, Inc. the Petitioner had never been employed as a bartender. In 1992 the Petitioner worked 60 percent of her hours as a bartender and 40 percent as a waitress. In 1993 the Petitioner's hours were split equally between bartending and waitressing (App., Vol. II., p. 140). The Petitioner admits that it is not degrading to work as a waitress. During the Summer of 1993, the Petitioner, a law student, pursued employment in the legal profession and felt the necessity to clerk additional hours with her secondary employer, a law firm. (Jt. App., Vol. II., p. 71). The Petitioner reduced her hours of employment with Tino's by yielding one of her shifts to another employee.

As summer came to an end and as football season approached, the Petitioner requested that she be allowed to work Sunday days and an additional shift. (Jt. App., Vol. II., p. 35). Castro assigned Gnadt to the Sunday day shift and the Tuesday evening shift commencing August, 1993. Due to a conflict with Gnadt's school schedule she switched her Tuesday night shift with the Monday night shift held by another employee, Jennifer Cohn. Cohn had worked as a bartender on Monday nights, while

the Petitioner had worked as a cocktail waitress on Tuesday nights.

In late August, 1993 a meeting was held at the restaurant. (Jt. App., Vol II., p. 78). In attendance at the meeting were Castro, Bernardo Terrazas, Gnadt, Paulette Duval, and most of the bartenders and waitresses. As a result of members of the staff leaving the Commonwealth of Virginia for college and other professional and employment opportunities, the need for additional personnel during peak hours of the restaurant was discussed. (Jt. App. Vol. II., pp. 79-83). Management decided to place an advertisement in the newspaper to hire additional bar and wait staff. Two additional bartenders were hired, Suzanne Gonzales (female), and Michael Devine (male).

In an attempt to integrate Devine and Gonzales into staff rotation, Devine was assigned to work Monday evenings as a bartender. Gnadt's Monday night shift was rescheduled to Friday night. Gnadt admits that management decides how to integrate new hires and determines shift schedules. Gnadt admits she never spoke to Devine about his assignments or shifts. Gnadt admits she does not know whether or not the shift assignments were to accommodate Devine's conflicts with other work commitments. A witness, Diane Fallon, called on behalf of Gnadt, admitted that Castro informed Gnadt why he had hired Devine and "juggled" the schedule. (Jt. App., Vol. II., p. 184).

The notice of the scheduling change was communicated to Gnadt on October 15, 1993. (Jt. App., Vol. II., p. 42). Gnadt, upset at her shift change, simply failed to show up for her scheduled Sunday day shift on October 17, 1993. Gnadt admits that she resigned on October 17, 1993. (Jt. App., Vol. II., p. 129). On October 17, 1993 Gnadt communicated to Castro, after her non-appearance, that she was resigning. Castro responded that he did not fire Gnadt, that he did not consider Gnadt's transfer a

demotion, and that Gnadt would not experience a pay cut. Castro told Gnadt he did not want her to quit. (Jt. App., Vol. II., pp. 153-155).

2. Post Employment Activities

On or about December 2, 1993, after Gnadt had resigned, Castro called the home of a mutual acquaintance where Gnadt was house sitting and left the message on the telephone recorder.[1] Notwithstanding the message, Gnadt admits that she has no knowledge of any communication from Castro to any third party of the fact that an EEOC complaint was filed. Gnadt admits that she has no knowledge of any communication made by Castro to any prospective employer. Gnadt testified that she had no knowledge of any attempts by Castro to obstruct her ability to obtain employment. (Jt. App., Vol. II., p. 16). Gnadt admits that Castro did not threaten her physically or use vulgarity towards her. Gnadt admits that she interpreted the recorded telephone message to mean that Castro felt that he would prevail and "beat me down to a pulp in a court of law". (Jt. App., Vol. II., p. 164).

Following her resignation, Gnadt admits she successfully completed her law school studies, obtaining a cumulative G.P.A. in excess of 3.0. Gnadt admits that she continued clerking at the law firm of Martinez & Sandoval, P.C. (Jt. App., Vol. II., pp. 166, 167). Gnadt admits she obtained substantially similar employment at two restaurants, Bravo's and Applebee's. Gnadt admits that she successfully studied for and passed the bar exam in July, 1994.

After the recorded telephone message, Castro made no further attempts to contact Gnadt. (Jt. App., Vol. II., p. 61). The

---

1. The text of the recorded message can be found on pages 3 and 4 of the Petition for Writ of Certiorari.

Petitioner was not deterred from seeking employment in the legal profession as she continued to search for employment. (Jt. App., Vol. II., p. 61).

Gnadt timely filed this Petition for a Writ of Certiorari, asserting only the retaliation count.

SUMMARY OF THE ARGUMENT

Protection against retaliation afforded by Title VII does not extend to former employees. 42 U.S.C. § 2000e-3(a) specifically states it is unlawful for an employer to retaliate against an employee or applicant for employment. No mention is made of former employees. Title VII's definition of employee is not ambiguous. Any further interpretation of the statute is unwarranted and unnecessary.

Exclusion of former employees is consistent with a plain reading of Title VII. The Fourth Circuit, sitting en banc in the case of *Robinson v. Shell Oil Co.*, 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376), acted correctly in holding that the anti retaliation provisions of Title VII does not extend to post employment retaliation. The courts that have extended anti-retaliation protection to include former employees have done so when retaliation results in discharge from a later job, a refusal to hire, or other professional or occupational harm. The Petitioner has suffered no such harm.

The Petitioner failed to demonstrate that the Respondents engaged in any adverse employment action which interfered with any prospective business, educational, or other opportunities of the Petitioner. The Petition for Writ of Certiorari should be denied. In the alternative, the Court should defer consideration of this Petition until the Court decides the case of

Robinson v. Shell Oil Co., 70 F.3d 325 (4th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3605 (U.S. April 22, 1996) (No. 95-1376).

REASONS FOR DENYING THE WRIT

I.

PROTECTION AGAINST RETALIATION UNDER TITLE VII DOES NOT EXTEND TO FORMER EMPLOYEES.

The anti-retaliation provisions of Title VII are found in 42 U.S.C.A. § 2000e-3(a), which states in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants of employment, . . . because he opposed any practice made an unlawful employment practice by this Title (42 U.S.C. §§ 2000e-2000e-17), or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Subsection 2000e(f) defines "employee", for purposes of all provisions of Title VII, as "an individual employed by an employer". 42 U.S.C. § 2000e(f). Because the language in Title VII's definition of "employee" is not ambiguous, there is no need to resort to the legislative history of the statute. *See United States v. Murphy*, 35 F.3d 143 (4th Cir. 1994).

Words should be interpreted according to their common usage and "[c]ourts are not free to read into the law what is not there, but rather should apply the statute as written." *K-Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L. Ed. 2d 313 (1988).

As the Fourth Circuit Court of Appeals held in *Robinson v. Shell Oil Co.*, 70 F.3d 325, 328 (1995).

> If a statute defines a term in its definitional section then that definition controls the meaning of the term wherever it appears in the statute. *See Florida Department of Banking & Finance v. Board of Governors of the Federal Reserve System*, 800 F.2d 1534, 1536 (11th Cir. 1986). (Definition of term in definitional section of statute controls construction wherever that term appears throughout the statute), cert denied, 481 U.S. 1013, 107 S. Ct. 1887, 95 L.Ed 2d 494 (1987). As a general rule, a definition which declares what a term means necessarily excludes any meaning that is not stated.

The Fourth Circuit recognized that if the statutory language "is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion". *Id.* at 329 (quoting *Caminetti v. United States*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917).

The Respondents ask this Court to follow the Fourth Circuit's opinion *in toto*, which follows the well-settled rule that in the absence of express congressional intent, courts must assume that Congress intended to convey the language's ordinary meaning.

There is no ambiguity in the statute's definition of employee. There is no question that to establish a prima facia

case of retaliation, under Title VII, requires the *employee* to suffer an "adverse *employment* action" which necessarily entails conduct that occurs during the employment relationship. One need only examine the statutes ordinary and simplistic language to ascertain that any adverse action, however unsavory, taken after the employment relationship has terminated, cannot be actionable under Title VII.

The Petition for Writ of Certiorari should be denied.

II.

ANTI-RETALIATION PROTECTIONS, IF APPLICABLE, EXISTS WHEN THE RETALIATION RESULTS IN DISCHARGE FROM A LATER JOB, REFUSAL TO HIRE, OR OTHER PROFESSIONAL OR OCCUPATIONAL HARM.

The Petitioner contends that the majority of Circuits have construed § 704(a) to protect employees against acts of post-employment retaliation by their past employers arising out of and related to their former employment. The Courts that have extended anti-retaliation protection to include former employees have done so when retaliation results in discharge from a later job, refusal to hire, or other professional or occupational harm. *See, e.g., Passer v. American Chemical Society*, 935 F.2d 322, 331 (D.C. Cir. 1991), (employer deprived former employee of "rare and prestigious" professional laurel in retaliation for filing discrimination claim); *Charlton v. Paramus Board of Education*, 25 F.3d 194 (3rd Cir. 1994) (school district alleged to have revived state proceedings for revocation of teacher's teaching certificate in retaliation for her decision to continue pursuing a Title VII action challenging her termination as discriminatory); *Bailey v. USX Corp.*, 850 F.2d 1506 (11th Cir. 1988) (former employer made adverse comment to prospective employer in retaliation for former employee's previous sex

discrimination suit); *O'Brien v. Sky Chefs, Inc.*, 670 F.2d 864 (9th Cir. 1982) (former employer refused to rehire and gave bad recommendations after termination and filing of the EEOC charges); *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052 (2nd Cir. 1978) (employer's refusal to furnish letters of recommendation in retaliation for the Plaintiffs having filed discrimination charges with the EEOC); *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) (former employee advised a prospective employer of fact that employee had filed a sex discrimination charge); *E.E.O.C. v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) (employer discontinued employee's severance pay because he had filed charge); *Dunlop v. Carriage Carpet Shop*, 548 F.2d 139 (6th Cir. 1977) (employer informed a prospective employer of the fact that former employee had filed a complaint with the Department of Labor).

The Petitioner, in the case at hand, was not discharged from a later job. The Petitioner was not refused employment with a prospective employer for filing a claim. The Petitioner admits that she has no knowledge of suffering any professional or occupational harm. The trial court's factual findings suggest that there is no evidence whatsoever that any actions taken by the Respondents in any way interfered with the prospective business, educational, or other activities of the Petitioner. (App. A.5a). Accordingly, the Petition for Writ of Certiorari should be denied.

III.

THE DISTRICT COURT DID NOT ERR IN ENTERING JUDGMENT FOR THE RESPONDENTS ON PETITIONER'S RETALIATION CLAIM, HAVING FOUND THAT THE RESPONDENTS DID NOT INTERFERE WITH ANY PROSPECTIVE BUSINESS, EDUCATIONAL, OR OTHER OPPORTUNITIES OF THE PETITIONER.

Ross v. Communication Satellite Corp., 759 F.2d 355 (4th Cir. 1985), established a test for determining whether an employee has established a prima facia case of retaliation.[2] *Ross* in relying on the sequence of proof and burdens prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 1824-25, 36 L. Ed. 2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56, 101 S. Ct. 1089, 1093-95, 67 L. Ed. 2d 207 (1981) held that a prima facia case of retaliation consists of three (3) elements:

(1) the employee engaged in a protected activity;

(2) the employer took adverse action against the employee; and

(3) a causal connection exists between the protected activity and the adverse action. *Id.* 759 F.2d at 365.

In *Fahie v. New York City Department of Corrections*, 737 F. Supp. 15 (S.D.NY 1990), the court, in granting the defendant's motion for summary judgment, held that to make out a prima facia case under section 704(a) of Title VII (42 U.S.C. § 2000(e)-3(a), the appellant must show that he engaged in an activity

---

2. Ross did not address retaliation against a former employee.

protected under Title VII, that his activity was known by the alleged retaliator, *that an adverse employment action disadvantaging him occurred,* and that a causal connection exists between his participation in the protected activity and the adverse employment action. (Emphasis added).

In *Evans v. Davey Truckers, Inc.*, 769 F.2d 1012 (4th Cir. 1985), the employee (like the Petitioner), voluntarily resigned his employment and therefore suffered no adverse employment action at the hands of the employer.

In the case at bar the Respondent, Castro, exercised no control over the Petitioner after her voluntary resignation on October 17, 1993. The Trial Court correctly found that, the Petitioner failed to produce any evidence that the Respondents interfered with any employment opportunities of the former employee. (App. A. 5a) This Court need not decide the issue of whether threats to interfere with future employment opportunities of a former employee may constitute retaliation. The trial court's factual determination that the Petitioner suffered no adverse employment action was clearly not erroneous. The trial court found, through the Petitioner's own admissions, that there was,

> No evidence whatsoever that any phone calls or contacts, or any actions, had been taken by the Defendant to in any way interfere with prospective business, educational, or other kinds of activities. Therefore, I find no factual basis to support the Petitioner's case on the retaliation issue.

(Jt. App., Vol. II, p. 213; App. A. 5a).

In the case at hand, the Petitioner testified that she had no further contacts with her employer after having received possession of a recorded message left at the house of a third party. She admits that she continued to interview for employment in the legal profession. The Petitioner admits that there exists no evidence that the Respondents in any way interfered with her applications for employment. The Petitioner admits that she has no knowledge of any communication by the Respondents with any prospective employers. The Petitioner admits she has no evidence that Castro has defamed her to any third party. The Petitioner admits to having successfully maintained her clerkship. The Petitioner admits having secured two (2) other similarly situated waitressing and bartending positions at Bravo's and Applebee's. In fact, the Petitioner can point to no fact that suggests that there was ever a causal connection between the recorded message and *any* adverse effect upon employment opportunities.

The Petitioner asserts no error to the Trial Court's factual findings. Accordingly, the Petition for Writ of Certiorari should be denied. Rule 10 of the Rules of the Supreme Court of the United States.

CONCLUSION

The wording of § 704(a) is clear and unambiguous. Former employees are not protected against retaliation. The opinion of the Fourth Circuit is correct.

Anti-retaliation protection, if applicable at all, exists only when the retaliation results in a discharge from a later job, refusal to hire, or other professional or occupational harm, factors which are non-existent in the case at bar.

The Respondents did not interfere with any prospective business, educational, or other opportunities of the Petitioner. The Petition of Writ of Certiorari should be denied.

Respectfully submitted,

GREGORY BECKWITH
Counsel of Record
PHILLIPS, BECKWITH & HALL
Attorney for Respondents
10513 Judicial Drive, #100
Fairfax, VA 22030
(703) 691-4100

APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS

[Commencing at page 208]

* * *

and I will consider the arguments. I want to look at one thing back in Chambers, one of the cases. And I will give you a ruling at the end of the break. Ten minutes.

(Whereupon, at 3:58 o'clock p.m., a short recess was taken.)

THE COURT: All right. I'm going to take the counts in the order in which they are filed in the complaint.

The first count is the discrimination count. The plaintiff has certainly made out several of the elements there. She has made out the fact that she is a member of the protected class. I'm going to find that she was qualified for the bartender position based upon the fact she had been doing the job at the defendant corporation.

Whether the plaintiff was rejected — she certainly didn't apply for a position — whether she was demoted is certainly an issue that is up for grabs, because there is certainly evidence before the Court that the Friday night position would have generated an equal amount if not more of tips. But I again at this stage of the proceedings have to draw the inferences in favor of the plaintiff, and therefore will make a finding that at least at this stage of the evidence, that the plaintiff has been able to make the burden that she was to some degree demoted. Although I will note it was a very de minimis demotion. At most it was $2 [209] an hour for what, a six or seven-hour shift. So we are talking about $12 to $14 per week difference in pay.

But then there's also the issue about whether it's a demotion to go from bartender to waitress. That's more of I guess a psychic demotion. But again I will make that finding as well.

And then the fourth, the person who happened to fill her position was a member of an unprotected class.

Now, it's true that Mr. Devine was a male and he actually replaced the plaintiff, but the evidence is also unrefuted that in fact two bartenders were hired. It was serendipitous, it seems to me, and there is no evidence one way or the other as to why — there's evidence that's come in — no, it hasn't, that was in the opening statement. There is no evidence as to why Devine got those particular days versus the woman. But clearly a woman bartender had been hired. So in that respect the plaintiff has made out a prima facie case.

However, there's also clearly before the Court in the evidence that's been brought in so far the fact that there was a need to hire additional personnel, and the plaintiff herself has admitted that it was completely up to the discretion of Mr. Castro to hire those people whom he needed to fulfill his personnel needs.

I think therefore that that evidence is strong [210] evidence in the defendant's favor of a nondiscriminatory reason for arranging the shifts the way they were done.

The only piece of evidence in this case whatsoever, in my opinion, that there was any kind of a gender bias in this particular arrangement of the employment shifts is the one statement by Mr. Bernardo that it would look tacky to have a male bartender and a female waitress. But there is no evidence that Mr. Bernardo

had anything to do with the decision to either hire Mr. Devine or to make the shift assignments that were at issue in this case.

Moreover, there's certainly a strong history in that agency of female bartenders with male waiting persons. And therefore I don't believe that the plaintiff has met her burden of establishing a case that there was gender bias involved in the reallocation of the work shifts.

And so as to count 1, I'm going to enter judgment as a matter of law for the defendant.

Now, the rest of the counts, frankly, are I think for the Court based on the evidence in this case, much easier to resolve.

On the constructive discharge, there is quite clearly in my mind no evidence to show that there was any deliberate effort made on the part of Mr. Castro to create an intolerable working situation for the plaintiff. The evidence is that they were shifting around personnel [211] people. There was no evidence that he wanted the plaintiff to quit. In fact, the evidence from the plaintiff's own testimony is that during the course of the conversation, at one point Mr. Castro said, "I don't want you to quit."

Furthermore, the working conditions, in the Court's opinion, are not the type of intolerable working conditions which the cases have pointed to. At most, it was an change of night, a change of function from bartending to waitressing. There is a $2 an hour hourly rate diminution in salary, but that's not an intolerable working condition in this Court's eyes.

Thirdly I think here that the voluntary resignation of the

plaintiff under these circumstances was unreasonable. This plaintiff had worked for I guess it was about a year-and-a-half for this defendant, and, you know, there is no evidence in this case whatsoever that up until this point there was ever any real problem between the plaintiff and her employer. It doesn't seem reasonable to me on this kind of a situation alone that a long-term employee would just up and quit. In fact the record shows that the company, that the defendants had been very accommodating to work shifts changes all the time to accommodate changes in the plaintiff's school schedules.

So the picture that's been painted for the Court is of a fairly accommodating and reasonable employer [212] allowed you to come in to some of your shifts late. Remember there was testimony about that. Who had worked with you to keep you employed. And even after the October 15th weekend, at least as of the 17th, Mr. Castro was still asking you to come back.

So I think it was an unreasonable voluntary resignation and not constructive discharge. So the court is again entering judgment for the defendant as a matter of law.

Now on the retaliation claim, I think that you are correct, Ms. Lyons, on the issue that the Fourth Circuit case is no longer good law. And, frankly, I think that is probably basically a therapeutic and a good result. So in terms of the legal issue, I think it is possible for this Court to find that retaliation occurred, at least from a legal standpoint. But again I have to look at the facts that are before me.

Now I have got to say that Mr. Castro's statement is one of the dumber things he's probably ever done in his life. I'm sure he regrets it. And it was an expensive error because I think it was

probably part of what fueled the fire for this case anyway. It should not have happened. The plaintiff had an absolute right to file an EEOC complaint if she wanted to. And it was further aggravated, although it is not part of the retaliation issue [213] here, by once a lawyer writes a letter to somebody saying I represent someone, you know, deal with me, to go on and try to deal with that person directly is also really very bad conduct. I'm sure that Mr. Beckwith has counseled Mr. Castro about that.

However, what the Court has to look at with retaliation is whether or not there is any evidence in the case that the defendant interfered with any prospective employment opportunities for the former employee, and there is absolutely no evidence of that other than a threat by Mr. Castro to keep the plaintiff from ever getting a law job.

She herself admitted several times because I think Mr. Beckwith sort of beat it into the ground that she had no evidence whatsoever that any phone calls or contacts or any actions had been taken by the defendant to in any way interfere with prospective business, educational, or any other kinds of activities. And therefore, I find no factual basis to support the plaintiff's case on the retaliation issue. And I'm entering judgment as a matter of law as well for the defendant on Count 3.

And on count 4, that one is that intentional infliction of emotional distress in Virginia and in the Fourth Circuit is an extremely, as you know, Ms. Lyons, extremely hard cause of action to make out, and certainly under the facts that are here, it is simply not there.

[214] First of all, the Court has had the benefit of listening to the tape, which is the critical piece of evidence on this issue, and

the voice, anybody listening to the voice of Mr. Castro, while the words are upsetting, I don't deny you that, the tone of voice is not what I would say any average person would call to be a threatening tone of voice.

Secondly, there's just in my opinion no solid evidence, not even flimsy evidence, there is no evidence of any kind of a severe or serious emotional distress. The plaintiff simply has not presented anything other than the fact that she was upset, but that's not what the law calls severe emotional distress.

There was no counseling. There wasn't even serious enough of a problem to discuss it a lot with her boy friend. Most people if they are really upset about something are going to talk about it with somebody.

There is no evidence of sleeplessness. It didn't interfere with her school work.

The only piece of evidence that I could see in the record about some impact was the attorney's testimony that she seemed distracted, and that her work had suffered. I don't think distraction is equivalent in Virginia to severe emotional distress. And so for that reason, judgment will also be granted to the defendant on count 4.

[215] And therefore, I believe that terminates the case, because all four counts have now been ruled upon.

If there's anything further — we have — there are some tax records that are in among the exhibits here that are in court. I don't like to leave tax records just floating around in the case file. But you all have to decide how you want to proceed from here.

All right. But I don't believe there's anything further we need to address today.

Mr. Beckwith?

Anything further from the defendants?

MR. BECKWITH: I would be willing if counsel would want to supplement copies of the tax records to have the originals returned.

MS. LYONS: I don't think there are any originals.

THE COURT: I mean, if you want to leave them in for purposes of the record, although frankly they were never admitted into evidence. I don't think you used them in your case in chief.

MS. LYONS: No, I did not.

THE COURT: You never got to the defendants' case. So you can decide how you want to sort through that stuff. All right?

MS. LYONS: All right.

Thank you, Your Honor.

[216] THE COURT: Thank you.

We will recess court until 8:45 tomorrow morning.

Whereupon, at 4:20 o'clock p.m., the above-captioned matter was concluded, and court stood in recess.